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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–482

VICTOR L. MARCHETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division (Pet. App. 19a–28a), nor the opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1a–18a) is reported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1972. The petition for a writ of certiorari was filed on September 21, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly enjoined petitioner, a former employee of the Central Intelligence Agency, from violating his agreement with that agency, made when he entered employment there, that, without the prior approval of the agency, he would not publish or disclose any classified information he obtained through his employment.

STATUTE INVOLVED

Section 403(d)(3) of Title 50 of the United States Code provides:

> § 403(d) For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council—
>
> * * * * *
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided,* That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions: *Provided further,* That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: *And provided further,* That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;
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> * * * * *

STATEMENT

The United States brought this suit to enjoin the petitioner, a former employee of the Central Intelligence Agency ("the Agency"), from further violating his secrecy agreement with the Agency, by disclosing, publishing or otherwise revealing certain currently classified intelligence information. The United States also sought an order requiring petitioner to submit to the Agency for examination prior to their release any writings which purport to relate to the Agency, intelligence information or intelligence sources and methods, in order to insure that the disclosure of such information is not prohibited by the secrecy agreement.

Petitioner was an employee of the Agency from October 3, 1955 until he resigned, effective September 5, 1969. During this time he occupied various positions of trust and responsibility, including that of Executive Assistant to the Deputy Director.

On October 2, 1955, prior to beginning his work at the Agency and before he was given access to classified information, petitioner executed a secrecy agreement undertaking not to divulge in any way any classified information, intelligence or knowledge, except in the performance of his official duties, unless specifically authorized in writing by the Director or his authorized representative. The agreement also provided

that the undertaking would continue after he left the Agency.[1]

At trial, the government presented the testimony of Mr. Thomas H. Karamessines, a Deputy Director of the Agency, and Mr. Howard J. Osborn, Director of Security for the Agency. Mr. Karamessines testified that various statements in an article submitted by petitioner to *Esquire* Magazine and six book publishers contained classified information which would compromise intelligence related operations of the Agency (Tr. 10–20). He further testified that the disclosures would have a serious and substantial adverse impact upon national security interests, and explained in detail why that was so (Tr. 10–20, 40, 69, 72, 77–79, 82–84, 88–91). Mr. Osborn testified that petitioner, in the past, had violated his secrecy agreement in the course of media interviews in which he participated during 1971 by disclosing classified information (Tr. 107, 109–110).

Petitioner admitted that he had submitted an article to *Esquire* Magazine and to six publishers in March 1972, as the basis of a book, without previously submitting it to the Agency (Tr. 156–159). Petitioner also admitted that for the most part the information

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[1] The agreement is set forth in full in Pet. App. 21a–22a. At the time petitioner was initially interviewed for employment with the Agency in March 1955, he signed a secrecy agreement in which he recognized that the sensitive nature of the Agency's work required the imposition of, and compliance with, strict security measures (Pet. App. 20a). Petitioner also signed an oath of secrecy upon terminating his employment (Pet. App. 22a–25a).

contained in the article was obtained as a result of his employment with the Agency (Tr. 159–161).[2]

The district court held that petitioner had entered into a valid secrecy agreement with the Agency, that at least five of the items appearing in the petitioner's article and at least three items which were taped for television interviews were classified, and that he had violated the agreement because the disclosure of the information had not been authorized by the Director of the Agency or his representative (Pet. App. 19a–28a).[3]

The district court enjoined the disclosure of any information relating to intelligence activities and any information concerning intelligence sources and methods (Pet. App. 30a). The court also ordered (Pet. App. 30a):

> That the defendant shall submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or cor-

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[2] The petition contains various references to statements in an affidavit and deposition of Mr. Osborn and answers to interrogatories by Mr. Helms. (*E.g.*, p. 11, n. 9). The statements and answers referred to were not introduced into evidence at the trial and thus they were not properly before either the district court or the court of appeals.

[3] The district court found (Pet. App. 27a): "[C]ontrary to the documents' proscriptions, the defendant has divulged and published and revealed, by writing and by word, information relating to the national defense and security and information of that nature relating to intelligent [sic] sources, methods, and operations, both classified and otherwise, without first obtaining consent of the CIA." The sealed brief filed by petitioner in an effort to demonstrate that the evidence was insufficient to satisfy a prior restraint under *New York Times Co.* v. *United States*, 403 U.S. 713, does not in any way detract from that finding.

> poration, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods, for the purpose of avoiding inadvertent disclosure of information contrary to the provisions and conditions of the aforesaid secrecy agreements, and such manuscript, article, essay or other writing shall not be released without prior authorization from the Director of Central Intelligence or his designated representative.

The court of appeals affirmed, ruling that the secrecy contract is valid and constitutionally enforceable, and otherwise reasonable and lawful. The court held, however, that the injunction against disclosure entered by the district court was too broad and limited it to barring classified material in accordance with the contract.

ARGUMENT

The government obtained an injunction in this case to prevent petitioner from further violating his contractual undertaking not to disclose classified intelligence information he obtained during his employment with the Central Intelligence Agency, the publication of which, according to top officials of that Agency, would compromise the Agency's intelligence-gathering activities. By statute, the Director of the Agency is responsible "for protecting intelligence sources and methods from unauthorized disclosure". 50 U.S.C. 403(d)(3). In carrying out this responsibility, the Agency requires employees as a condition

of employment to enter into a secrecy agreement. As the court of appeals held (Pet. App. 13a), such agreements are appropriate to implement the Congressional direction of secrecy, particularly since the information developed by the Agency is by its nature highly sensitive to the conduct of foreign affairs and to the national defense. The court of appeals decision thus accords with this Court's consistent recognition of the need for secrecy in the sensitive areas of foreign affairs and national security. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320; *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111; *E. W. Bliss Co.* v. *United States*, 248 U.S. 37.

1. Petitioner makes a three-fold attack upon the injunctive relief granted by the courts below. First, he claims that the contractual provision banning unauthorized disclosure of classified material is invalid and unenforceable, and that requiring submission of materials relating to the Agency for approval before publication is an unconstitutional prior restraint on free speech, even if approval for publication is ultimately granted. Second, petitioner claims that even if he may be required to submit materials in advance of publication for approval, approval can be denied only if in fact the material has been properly classified and that the court of appeals erred in holding that he may obtain judicial review only with respect to whether the material is classified and in the public domain. Third, petitioner argues that the terms of the injunction—allowing the Agency a "maximum" period of 30 days

in which to approve or disapprove the publication of materials—"are too broad."

a. Relying on *New York Times Co.* v. *United States*, 403 U.S. 713, petitioner claims that in the circumstances of this case his right to publish classified material is no "different from that of the New York Times and the Washington Post" (Pet. 18) and that the prior restraint imposed on him by the injunction can be justified only by showing that the "disclosure of the information sought to be restrained would 'surely result in direct, immediate and irreparable injury to the Nation or its people' " (Pet. 16, quoting the concurring opinion of Mr. Justice Stewart in *New York Times* v. *United States*, 403 U.S. 713, 730).

Petitioner's reliance on *New York Times Co.* v. *United States*, 403 U.S. 713, is misplaced. There the United States sought an injunction barring two newspapers from publishing information which they had obtained from specified classified documents. This Court held, in a *per curiam* opinion, that the United States had not met the "heavy burden" which is required before an injunction may be obtained restraining a newspaper from publishing news.

The instant case involves an action against a former employee of the United States who agreed, as a condition of his employment, not to disclose classified information which came into his possession during that employment. There is no injunction against any publisher. The order of the district court, which was

sought only after serious breaches of the agreement had occurred,[4] runs only against petitioner and merely requires him to comply with the contract into which he had freely and voluntarily entered.

Petitioner asserts, however, that while "private parties may agree by contract to waive their rights under the Constitution, when the government is a party to an agreement such waivers are unenforceable if they involve fundamental rights of free speech * * *" (Pet. 19). Regardless of the reasonableness of the contractual provision and the significant interest of the United States in maintaining the confidentiality of classified documents, petitioner argues that the restrictions which may be imposed on his freedom to publish classified information are no different from those which may be imposed on a newspaper. While it has been held that "unreasonable" conditions may not be attached to public employment (*Keyishian* v. *Board of Regents*, 385 U.S. 589, 605–606), this Court has nevertheless recognized that a public employee may be subjected to greater restraints than ordinary citizens. As the Court observed in an

[4] The affidavit of Thomas H. Karmessines, which was admitted in evidence in the district court and which we are filing as a sealed exhibit, sets forth at least five separate items of classified information, appearing in an article submitted to *Esquire* Magazine, which would compromise currently active intelligence sources and jeopardize current intelligence-gathering operations. See, also, *supra*, p. 4. Petitioner does not deny that he possesses such information, but contends that the Agency should rely on his judgment with respect to the effect that disclosure will have on national security (Pet. 13).

analogous context in *Pickering* v. *Board of Education*, 391 U.S. 563, 568, cited by petitioner (Pet. 19):

> * * * "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents, supra*, [385 U.S.] at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.[5]

The Central Intelligence Agency, whose principal function necessarily touches upon the most sensitive and confidential matters bearing on the Executive's conduct of foreign policy, "has interests as an employer" that differ "significantly from those it possesses in connection with regulation of the speech of

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[5] There are, of course, numerous cases in various contexts reaching a similar conclusion. See, *e.g.*, *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Goldwasser* v. *Brown*, 417 F. 2d 1168, 1176-1177 (C.A.D.C.), certiorari denied *sub nom. Goldwasser* v. *Seamans*, 397 U.S. 922. Courts have authorized injunctions against publications where important governmental interests were at stake. *Moon* v. *United States*, 371 F. 2d 348 (C.A.D.C.); *United States* v. *Hunter*, 459 F. 2d 205 (C.A. 4), certiorari denied, 41 U.S. Law Week 3208; see also *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620; Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. Pa. L. Rev. 271 (1971). Cf. 5 U.S.C. 552(b)(1), which provides an exemption from disclosure under the Freedom of Information Act for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy * * *."

the citizenry in general," in conditioning employment on a promise by the employee that he not make unauthorized disclosure of classified information which comes into his knowledge and possession during his employment. As the court of appeals stated (Pet. App. 13a–14a):

> Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.
>
> Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. * * *

b. Petitioner claims that the courts below adopted an erroneous standard for judicial review of the Agency's refusal to authorize publication of particular material. The court of appeals held that legal and practical considerations precluded judicial review of a

decision by the Executive that particular information be classified (Pet. App. 15a). Judge Craven, in a concurring opinion, suggested that conclusive effect should not be given to the classification, but that a presumption of reasonableness attached to the classification; and that this presumption could be overcome only by clear and convincing evidence that the classification is arbitrary and capricious (Pet. App. 17a). Petitioner argues that *if* he submits a proposed publication for approval and *if* approval is denied on the ground that material sought to be published is classified, his right to judicial review must cover not only the issues whether the material is classified or already in the public domain, but also whether the material has been properly classified.

While we agree with the majority opinion in the court of appeals, the issue is premature. Petitioner has not submitted any material for approval, and the Agency has not declined to approve any material for publication. The question of judicial review of Agency disapproval of material will not arise unless and until petitioner submits material and the Agency disapproves all or part of it, and petitioner challenges the action in court. At the present time that question is academic.

c. Petitioner's final claim relates to the terms of the injunction, which allow the Agency "a maximum" of thirty days in which to determine whether the material submitted contains classified information. This provision he claims is "too broad"; a one day period, he suggests, would be sufficiently narrow (Pet. 21–22).

The thirty day period is a reasonable "maximum"

period for the Agency to evaluate writings which may include anything from a detailed article to a complete volume dealing with its affairs. Unlike determinations in obscenity cases, here the material must be reviewed to determine whether any of the information has as its source a classified document to which petitioner had access during fourteen years of employment.

Kingsley Books, Inc. v. *Brown*, 354 U.S. 436, on which petitioner relies in support of his suggestion that "one day" would be an appropriate period, is inapposite. *Kingsley Books* was not a prior restraint case, and the Court in *Freedman* v. *Maryland*, 380 U.S. 51, in which the statutory procedure in *Kingsley* was cited, declined "to lay down rigid time limits" and recognized that a longer period of time would be appropriate in a different context (380 U.S. at 61). The Court suggested in *Freedman* that since films are scheduled for showing well before actual exhibition, "[o]ne possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition" (380 U.S. at 61). Manuscripts for books and drafts of magazine articles, like films, are generally available well before the presses roll; the limited period of time involved here hardly poses an unreasonable burden on the exercise of petitioner's First Amendment rights.

Moreover, this case does not involve a general censorship statute, but an equitable decree always subject to judicial control and modification should the circumstances warrant. The court of appeals held that "the CIA must act promptly to approve or disap-

prove any material which may be submitted to it" (Pet. App. 14a). If petitioner is able to establish an unwarranted delay even within the thirty day period or if in a given case speed is of the essence, he would not be without a remedy.

2. Petitioner alleges that "[s]ince Congress has never authorized extraction of the secrecy agreements in this case or suit to enforce them", the district court was without jurisdiction to entertain he complaint (Pet. 23).

This argument ignores 50 U.S.C. 403(d)(3), *supra* p. 2, which expressly states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Congress obviously intended that the Director, in exercising his designated "responsibility," would formulate reasonable rules and regulations for protecting intelligence sources and methods from unauthorized disclosure. It was within the Director's authority to require a prospective employee to enter into a contract in which the latter agreed not to disclose classified information coming into his possession during employment. There can be no serious dispute that under 28 U.S.C. 1345, which confers on the district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States", the district court had jurisdiction to entertain this action for specific enforcement of a contract.

Moreover, apart from the claim for specific performance of a contract, "the United States may sue to protect its interests." *Wyandotte Co.* v. *United States*,

389 U.S. 191, 201. Petitioner concedes as much (Pet. 24), but argues that "any such attempt to enjoin arguably protected First Amendment activity runs immediately afoul of the clear prohibition on prior restraints" (Pet. 24–25). But this argument does not go to the issue of standing or to the jurisdiction of the court to decide the claim. The United States had standing to bring this action and the district court had jurisdiction to decide the case.

3. Petitioner's final argument is that the government "exercised an intolerable degree of control" over his trial preparation, "thus creating a denial of due process and a high potential for the miscarriage of justice" (Pet. 26). Petitioner claims that the government improperly required that those assisting him in the preparation of his defense and prospective witnesses be cleared for access to classified materials before they could examine the confidential and classified information involved in this case.

The procedure to prevent further unauthorized disclosure of classified materials was approved by the court of appeals' order dated April 26, 1972. The order, however, conditioned the right of the United States to conduct security clearance of prospective witnesses on the representation that the government would not attempt to dissuade any witness whose name had been submitted from testifying.

There is no allegation that this order was disregarded; that petitioner did not ultimately obtain access to all relevant materials; or that petitioner was

in any way prejudiced in presenting his case. The charge that the government exercised "an intolerable degree of control" over his defense is unsupported by the record.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1972.

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[6] Petitioner claims that the district court improperly denied his application for access to the sealed transcript of the proceedings in the *New York Times* case and that the "effect of this order was to deny the defendant access to the record of the only case in which standards were devised for determining the scope of the extraordinary exception to the rule against prior restraints * * *" (Pet. 28). Whether the district court judge had the power to grant this request with respect to sealed records in another district court is debatable. But, in any event, as we have already demonstrated, the standard applied in the *New York Times* case is not appropriate in the context of this case. Both courts below agreed; hence the denial of access to the sealed transcript did not interfere with petitioner's defense.

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